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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MONICA GREENE, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

WILLIAM J. MURPHY
JOHN J. CONNOLLY
MURPHY & SHAFFER
100 Light Street, Suite 750
Baltimore, MD 21202
(410) 752-1564

SALLY P. PAXTON
JACQUELINE R. DEPEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

*JANELL M. BYRD
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Petitioners

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I

The *Brief of Respondent in Opposition* continues the consistent refusal of Mr. Podberesky, throughout this litigation, to acknowledge either the breadth and scope of Maryland's discriminatory exclusion of its African-American citizens from higher educational opportunities, or the State's long delay in taking any effective actions to overcome the legacy of segregation at the College Park campus -- which further entrenched the school's identity as a "white institution" despite the State's formal policy of admitting students without regard to race.

Respondent's approach is reflected at the outset in his restatement of the Questions Presented. The first question that he frames describes the University of Maryland as having "at least 40 years ago eliminated all policies and practices -- traceable to the segregative era -- which had segregative effects." It is undisputed, though, that all the University did in 1955 was to eliminate its formal policy of absolutely excluding African-American students from admission as undergraduates. Discrimination against blacks

and discouragement of their attendance at UMCP in more than the most token numbers continued to be the operative policy of the State of Maryland until after OCR acted in 1969. See Pet. in No. 94-1620, at 7-8; Pet. App. at 38-44; UX 70 at 157-70.

Respondent's description of the context in which the University of Maryland adopted the Banneker Program thus is contrary to the record. It also is at odds with this Court's admonition in *United States v. Fordice*, ___ U.S. ___, ___, 112 S. Ct. 2727, 2736 (1992), that

> the adoption and implementation of race-neutral policies alone [does not] suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.

Compare Brief for Respondent in Opposition, at 14 ("UMCP has maintained race-neutral admissions procedures since 1954. Accordingly, UMCP has at all times since 1954 done all that is required of it under *Fordice*").

The court below exhibited the same myopic view of the effects of pervasive discrimination, *see, e.g.*, 38 F.3d at 154, Pet. App. at 10a ("any poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students"); *compare* Pet. in No. 94-1621, at 17-18 n.18.

As the Solicitor General has indicated to this Court, the decision below is inconsistent with *Fordice* and will, if left standing, impede the federal government's efforts to obtain effective remedies to enforce Title VI. *See Brief for the United States as Amicus Curiae Supporting Petitioners*, at 12-13, 18. The petitions should be granted to correct the

errors and remove the impediment to full constitutional compliance.

II

Respondent's *Brief in Opposition* is also remarkable for its complete failure to address the second and third Questions Presented by the Greene Petitioners. In particular, Respondent's silence indicates clearly the lack of any coherent justification for the inconsistent actions of the court below, when it first reversed the trial judge's grant of summary judgment for one party because there were material facts in dispute, and then directed entry of summary judgment for the opposite party notwithstanding those factual disputes. We continue to believe that the lower court's error in this respect is so clear as to warrant summary reversal and remand by this Court, see Petition in No. 94-1621, at 29 n.28.

III

We argued in our Petition (at 15-17) that this case merits review because it raises important issues that are distinct from those which the Court has addressed in prior decisions involving voluntary affirmative action. Respondent asserts, to the contrary, that the court below "simply follow[ed] clear-cut authority from this Court" (*Brief in Opposition*, at 11), and that its ruling is consistent with the "unanimous" holdings of the federal courts of appeals (*id.* at 17). Respondent substantially misrepresents the decisions he cites in an effort to force them into the Procrustean mold of his argument.

Respondent contends that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), govern this case. He charges that we engage in "a clear misreading" of those opinions when we seek to distinguish *Croson* and *Wygant* because in

each of those matters, "the allegedly remedial racial classifications were adopted 'in the absence of any findings of discrimination'" (*Brief in Opposition*, at 13). That contention cannot be squared with the Court's clear statement in *Croson* that:

> In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.

488 U.S. at 505. Nor is Respondent's reading of *Wygant* any more faithful to the text of the plurality opinion:

> Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. . . . [A] public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination. . . . Despite . . . years of litigation and three separate lawsuits, no such determination has ever been made.

476 U.S. at 277-78.

Wygant, says Respondent (*Brief in Opposition* at 13), "makes clear that . . . the focus should be on whether there exist *present effects* of past racial discrimination. *Wygant*, 476 U.S. at 274 (plurality opinion) [emphasis in original]." But the distinction that Respondent apparently seeks to make simply does not appear in the *Wygant* plurality opinion, either at the page cited in Respondent's brief or elsewhere.

Respondent's treatment of the rulings of the Courts of Appeals is similarly flawed. Neither *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994), nor *Hammon v. Barry*, 826 F.2d 73, 76-77 (D.C. Cir.), *cert. denied*, 486 U.S. 1036 (1988), discussed whether a "reputation for discrimination in the distant past [w]as sufficient justification for a race-based remedial program," *Brief in Opposition*, at 17. In both cases, the Courts of Appeals found that statistical evidence was insufficient to support an inference of discrimination, either because there was inadequate information about the makeup of the qualified labor pool, *Brunet*, 1 F.3d at 407, or because the comparison showed no underrepresentation, *Hammon*, 826 F.2d at 77-78.

Respondent also attempts to brush aside the ruling in *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), asserting that the case "involved the validity of a consent decree, an issue not present here . . . [and the Court of Appeals] based its decision in part on an unwillingness to overturn a settlement supported *by all parties* after 16 years of litigation" (*Brief in Opposition*, at 26 [emphasis added]). In fact, in *Geier* the United States *appealed* from entry of a decree to which all other parties gave their consent, and it unsuccessfully advanced the same contention that animates the decision below and Respondent's argument to this Court: "that the illegal condition of segregation in public higher education in [a State] was cured by adoption of an open-admissions policy and . . . good-faith recruitment efforts," *Geier*, 801 F.2d at 805.

In sum, notwithstanding Respondent's efforts to reframe the issues, this case presents important and substantial legal questions that have not yet been addressed by this Court, in the context of a ruling by the Fourth Circuit that is a marked departure from this Court's rulings

and that contrasts sharply with the holdings of other federal courts. The Petitions should be granted.

Conclusion

For the reasons stated above as well as those in the Petition, the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

WILLIAM J. MURPHY
JOHN J. CONNOLLY
MURPHY & SHAFFER
100 Light Street, Suite 750
Baltimore, MD 21202
(410) 752-1564

SALLY P. PAXTON
JACQUELINE R. DEPEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
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NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
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